



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 5, 2003

Ms. Sandra Smith  
Executive Director  
Texas Board of Chiropractic Examiners  
333 Guadalupe, Suite 3-825  
Austin, Texas 78701-3942

OR2003-8749

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192277.

The Texas Board of Chiropractic Examiners (the "board") received two requests for certain information related to named facilities and chiropractors.<sup>1</sup> The requestor's law firm subsequently narrowed the requests to exclude certain confidential information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). You advise that some of the requested information is being provided to the requestor, and you indicate that some of the requested information does not exist.<sup>2</sup> You claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered your arguments and have reviewed the submitted information.

As you acknowledge, the board has not sought an open records decision from this office within the ten business day time period, nor has it provided this office with the information required to be submitted within the fifteen business day time period, as prescribed by section 552.301 of the Government Code. Pursuant to section 552.302 of the Government

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<sup>1</sup> While we originally assigned two identification numbers to these requests, we have combined these requests into one ruling with the identification number listed above. The other identification number assigned was ID# 192279.

<sup>2</sup> The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As the application of section 552.101 provides a compelling reason for overcoming the presumption of openness, we address your arguments under this exception. *See* Open Records Decision No. 150 (1977).

You claim that the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal law.<sup>3</sup> We note that section 11131(a) of title 42 of the United States Code, relating to reports required to be made to the National Practitioner's Data Bank, provides that an "entity (including an insurance company) which makes payment under a policy of insurance, self-insurance, or otherwise in settlement (or partial settlement) of, or in satisfaction of a judgment in, a medical malpractice action or claim shall report, in accordance with section 11134 of this title, information respecting the payment and circumstances thereof." 42 U.S.C. § 11131(a). In addition, section 11137(b)(1) of title 42 of the United States Code provides:

Information reported under this subchapter is considered confidential and shall not be disclosed (other than to the physician or practitioner involved) except with respect to professional review activity, as necessary to carry out subsections (b) and (c) of section 11135 of this title (as specified in regulations by the Secretary), or in accordance with regulations of the Secretary promulgated pursuant to subsection (a) of this section. Nothing in this subsection shall prevent the disclosure of such information by a party which is otherwise authorized, under applicable State law, to make such disclosure. Information reported under this subchapter that is in a form that does not permit the identification of any particular health care entity, physician, other health care practitioner, or patient shall not be considered confidential . . .

42 U.S.C. § 11137(b)(1). Further, section 11137(b)(2) prescribes a civil monetary penalty for a violation of section 11137(b)(1). *See* 42 U.S.C. § 11137(b)(2). Additionally, section 60.13 of title 45 of the Code of Federal Regulations provides in part:

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<sup>3</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by federal law.

Information reported to the Data Bank is considered confidential and shall not be disclosed outside the Department of Health and Human Services, except as specified in § 60.10, § 60.11 and § 60.14. Persons and entities which receive information from the Data Bank either directly or from another party must use it solely with respect to the purpose for which it was provided. Nothing in this paragraph shall prevent the disclosure of information by a party which is authorized under applicable State law to make such disclosure.

45 C.F.R. § 60.13(a).

We understand you to contend that the submitted information constitutes information reported by an insurance company pursuant to section 11131. You do not indicate that there is any applicable law, regulation, or exception that authorizes the release of the submitted information in this instance. Therefore, we assume that none exists. Given that assumption, we agree that section 11131 is applicable to the information and that it is, thus, made confidential under section 11137 of title 42 of the United States Code and section 60.13(a) of title 45 of the Code of Federal Regulations. It must therefore be withheld pursuant to section 552.101 of the Government Code.<sup>4</sup>

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

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<sup>4</sup> Because we base our ruling regarding this particular information on section 552.101 of the Government Code in conjunction with section 11137(b)(1) of title 42 of the United States Code, we need not address your claim regarding the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code.

body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/lmt

Ref: ID# 192277

Enc. Submitted documents

c: Ms. Elizabeth Trevino  
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(w/o enclosures)